IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09..09..2005

C O R A M

THE HONOURABLE MR. JUSTICE R. BALASUBRAMANIAN
and
THE HONOURABLE MRS. JUSTICE PRABHA SRIDEVAN

C.M.A. No.602 of 1998

1. Jafferkhan @ Baba (deceased)
2. Munapkhan @ Valli Badsha
3. Mrs. Ajeema Bi
4. Shamshath Begum
5. J. Abdullah Khan
6. J. Jakir Hussain Khan
7. J. Ayub Khan
8. J. Ahamed Khan
9. J. Ameer Khan
10. J. Shakila Begum

(Appellants 3 to 10 brought on record as L.Rs. of the deceased first appellant vide order dated 20.1.2003 made in C.M.P. No.13267 of 1998 by S.J.,J. and D.M.,J.)

.. Appellants/Respondents/Defendants

Versus

1. Salima Bee
2. Mahaboob John
3. Sheik Dawood
4. Sabirum
5. Sattahar
6. Mohammed Saliya
7. Noorjakhan
8. Dowlath
9. Gulzar
10. Jageer Hussain
11. Haja
12. Alauddeen
13. Basheer
14. Mahaboob John
15. Siraj
16. Mahaboob Bee
17. Sowkath Ali

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

18. Kubera Begum
19. Bairoj
20. Minor Munnavvar
21. Minor Yaseef
22. Minor Yarab
23. Minor Niyamunidhinisha
24. Minor Barajana
25. Minor Sharmilla

(Minor respondents 20 to 25
represented by their mother
and natural guardian Bairoj,
the 19th respondent herein).. Respondents/Respondents/Defendants

- - - - -

For Appellants : Mr. G. Bharadwaj

For Respondents: Mr. K. Yamunan (R-1 to R-12)
R-13 to R-18 Given Up
R-19 to R-25 Not Ready

- - - - -

PRAYER : Appeal against the judgment and decree of the learned Sub Judge, Namakkal dated 3.10.1997 made in A.S. No.73 of 1989 preferred against the judgment and decree of the learned Principal District Munsif, Namakkal dated 31.3.1989 made in O.S. No.520 of 1981.

- - - - -

J U D G M E N T

PRABHA SRIDEVAN, J.

The mortgagees/defendants have filed this appeal against the order of remand.

2. The plaint case is hereunder :

The grandmother of the first plaintiff one Kulsam Bi created an usufructuary mortgage in favour of her daughter Kathun Bi in the year 1941. As per the terms of the deed, the mortgagee would be in possession of the properties and enjoy the usufructs in lieu of interest; the period stipulated for repayment of the debt was four years from 10.8.1941; it was open to the mortgagor to repay the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

amount earlier; upon such repayment, the mortgagee was bound to give back possession of the property; and if after the period of four years, the mortgagee demanded the amount, the mortgagor was bound to pay the principal and get back the properties. The mortgagor died and some of her legal heirs filed the suit for a declaration that plaintiffs 2 to 13 and defendants 3 to 6 are the owners of the suit property, for recovery of possession from defendants 1 and 2 and for mesne profits. There were other heirs of the mortgagor who did not co-operate with the plaintiffs and therefore, they were arrayed as defendants. The suit was filed in the year 1979. Paragraph 7 of the plaint deals with the question of limitation. The plaintiffs took protection under the Tamil Nadu Debt Relief Act 38 of 1972, by which any mortgage debt subsisting on that date would stand wholly discharged with effect from 15.12.1972 and since the mortgagors would have 30 years under Article 61 of the Limitation Act, 1963 from the date of discharge, the suit filed in the year 1979 was in time.

3. The defendants 1 and 2, in their written statement, pleaded that the time for redemption of the mortgage was fixed as four years and that it expired on 10.8.1945; the protection of Act 38 of 1972 cannot be invoked and as per the new Limitation Act, viz. Act of 1963, the plaintiffs' right of redemption got extinguished on 1.1.1970; the relationship of mortgagor and mortgagee ceased on and from 1.1.1970; Act 38 of 1972 applied only to mortgagees who are in possession as mortgagees on the date when it came into force; since on 15.12.1972, possession of defendants 1 and 2 was not in their capacity as mortgagees, the plaintiffs cannot claim the benefit of the Act.

4. The trial court dismissed the suit on the ground of limitation and it also held that the plaintiffs were not entitled to the protection of Act 38 of 1972. The trial court did not go into any of the other issues having dismissed the suit on the preliminary issue of limitation. The appellate court passed an order of remand, setting aside the judgment and decree on the conclusion that the suit was not barred by limitation and that the plaintiffs are entitled to invoke the protection of Act 38 of 1972. Aggrieved by this, the present appeal been filed.

5. Learned counsel Mr. G. Desappan 5 appearing for the appellants would submit that Article 61 of the Limitation Act, 1963, which deals with suits by a mortgagor to redeem or recover possession of an immovable property, gives the mortgagor thirty years from the date when the right to redeem or recover possession accrues. As per Section 60 of the Transfer of Property Act, 1882, the mortgagor has a right to redeem the mortgaged property 'at any time after the principal money has become due'. In the mortgage

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

deed, the recitals are, "மேற்படி வாயிதாவுக்குள் நான் எப்போது ரூ.300 கொடுத்தாலும் நீ பெத்துக்கொண்டு என் வீட்டை என் சுவாதீனத்தில் விட்டுவிட வேண்டியது." Learned counsel for the appellants would submit that notwithstanding the fact that the mortgage deed begins with the words, "அடியில் கண்ட சொத்தை இன்று முதல் நான்கு வருஉடிம் வரையில் சுவாதீனமும் அனுபோகமும் செய்து கொண்டும்.....", fixing a four year period for the mortgage, since the mortgagor had the right to pay the money at any time even within the period of four years, his right to redeem started from the date on which the mortgage deed was executed, which is 10.1.1941.

6. Mr. K. Yamunan, learned counsel appearing for respondents 1 to 12 would submit that the suit was rightly held to be in time. Learned counsel referred to Article 61 of the Limitation Act, 1963 which applies to suits to redeem or recover possession of immovable property mortgaged, and it gives a time of thirty years to file the suit from the date when the right to redeem or to recover possession accrues. Learned counsel submitted that the right to redeem would accrue only when the money becomes due and that will depend upon the period, if any, fixed in the mortgage deed. Learned counsel submitted that the mortgagor's right to redeem and the mortgagee's right to recover the money secured should coalesce and there cannot be two different dates of commencement of these rights. Learned counsel relied on two decisions which will be dealt with later. Learned counsel also submitted that after the Limitation Act of 1963 came into force, the plaintiffs had a time of thirty years from the year 1945, and the mortgage was subsisting when the Tamil Nadu Debt Relief Act, 1972 came into force; this Act makes special provisions with respect to mortgage debt in Section 8, as per which the mortgage debt became wholly discharged with the coming of the Act and once the debt became discharged, the right to recover possession accrued in favour of the plaintiffs and they had thirty years' time to file the suit for recovery of possession. Learned counsel submitted that the plaintiffs have filed the suit in the year 1979 and therefore, it is in time and it is futile to contend either that the suit is time barred or that the plaintiffs are not entitled to invoke the protection of Act 38 of 1972.

7. Let us now take up for consideration the issue involved.

8. Section 30 of the Limitation Act, 1963 provides as follows :

> "30. Provision for suits, etc., for which the precribed period is shorter than the period prescribed by the Indian Limitation Act, 1908. - Notwithstanding anything contained in this Act, -

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

(a) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908 (9 of 1908), may be instituted within a period of [seven years] next after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908 (9 of 1908), whichever period expires earlier.

[Provided that if in respect of any such suit, the said period of seven years expires earlier than period of limitation prescribed therefor under the Indian Limitation Act, 1908 and the said period of seven years together with so much of the period of limitation in respect of such suit under the Indian Limitation Act, 1908 (9 of 1908), as has already expired before the commencement of this Act is shorter than the period prescribed for such suit under this Act, then, the suit may be instituted within the period of limitation prescribed therefor under this Act,]

(b) any appeal or application for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908 (9 of 1908), may be preferred or made within a period of ninety days next after the commencement of this Act or within the period prescribed for such appeal or application by the Indian Limitation Act, 1908, which ever period expires earlier."

Learned counsel for the appellants would submit that the proviso to Section 30, if applied, the suit ought to have been filed in 1970. Even assuming without admitting that the right to redeem commenced only in 1945, the suit should have been filed before 1975. The suit was filed in 1979 and, therefore, was beyond time.

9. Originally, the law of limitation applicable on the date of the mortgage, viz. the 1908 Limitation Act gave the mortgagor sixty years to redeem the property from the date of the mortgage, which means from 1941, the mortgagor would have had time till 2001.

10. After the Limitation Act, 1963 came into force, the period of limitation for such suits was changed. The proviso to Section 30(a) of the Act will apply, since the period of seven years expires earlier than the period of limitation prescribed under the 1908 Act for such suits. We have to add the seven year period to so much of the period of limitation in respect of such suits as per the Limitation Act, 1908, which had already expired. This period is 22 years (1963 - 1941 = 22), 7 years plus 22 years

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

is 29 years. This is shorter than the period prescribed for a suit for redemption under the Act of 1963 viz., 30 years. So the mortgagor could institute the suit within the period of limitation prescribed under the new Act, which means the mortgagor had thirty years from 1941. So according to the learned counsel for the appellants, the plaintiffs ought to have filed the suit in 1971.

11. Alternatively, the learned counsel would submit that even if this contention is not accepted and it is held that the right to redeem commenced only from 1945, the suit ought to have been filed before 1975. Learned counsel would submit that Act 38 of 1972 cannot in any way, extend the period of limitation.

12. Learned counsel appearing for the respondents placed two decisions which set at rest the controversy. First, A.I.R. 1932 P.C. 207 [LASA DIN VS. GULAB KUNWAR]. In that case, the mortgage was dated 26.7.1912. It was for a period of six years. Therefore, the mortgage money would have become due on 26.7.1918. But, the mortgage contained a clause which gave the creditor the power to realise the entire mortgage money at all times within and after the expiry of the stipulated period of six years, if there is a default in payment of interest. It was contended that immediately upon the default, the principal money became due within the meaning of Article 132 of the Limitation Act, 1908 and consequently, the statutory period of 12 years had expired before the institution of the suit. The Privy Council, after considering the decisions of various High Courts, held thus :

> "There can be no doubt that as pointed out by Lord Blanesburgh a proviso of this nature is inserted in a mortgage deed 'exclusively for the benefit of the mortgagees,' and that it purports to give them an option either to enforce their security at once, or, if the security is ample to stand by their investment for the full term of the mortgage. If on the default of the mortgagor - in other words, by the breach of his contract – the mortgage money becomes immediately 'due' it is clear that the intention of the parties is defeated and that what was agreed to by them as an option in the mortgagees is in effect converted into an option in the mortgagor. For if the latter after the deed has been duly executed and registered finds that he can make a better bargain elsewhere, he has only to break his contract, by refusing to pay the interest and 'eo instanti,' as Lord Blanesburgh says, he is entitled to redeem. If the principle money is 'due' and the stipulated term has gone out of the contract it follows in their Lordships' opinion that the mortgagor can claim to repay it, as was recognized by Wazir Hasan, J., in

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

his judgment in the Chief Court. Their Lordships think that this is an impossible result. They are not prepared to hold that the mortgagor could in this way take advantage of his own default; they do not think that upon such default he would have the right to redeem and in their opinion the mortgage money does not 'become due' within the meaning of Art.132, Lim. Act, until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would of course, also be the position if the mortgagee exercised the option reserved to him."

In this case, the mortgagee could recover the amount only after the four year period; so the mortgage money 'becomes' due only then, since that is when both the mortgagor's right to redeem and the mortgagee's right to enforce his security would have accrued. Therefore, the limitation period will expire on 10.8.1975. But, by that time, the Tamil Nadu Debt Relief Act 38 of 1972 came into force. Let us see what effect this Act had on the mortgage debt which was subsisting then.

13. The second decision relied on by the learned counsel for the respondents is 1980 T.L.N.J. 217 [GNANAKAN NADAR VS. GNANAMMAL]. This is also in favour of the plaintiffs. That was a case where an Othi was created and it was held by the learned single Judge that since the mortgage debts stood wiped out by the coming of Act 24 of 1950, the mortgagor who had a sixty year period under the old Act now had thirty year under the new Act to institute the suit for recovery of possession of the immovable property which had been mortgaged, and this period would commence from the date when the debt stood wiped out as per the Act. This was approved by the Division Bench in the following words :

"There is no controversy that by virtue of the operation of Section 9-A of Tamil Nadu ACt IV of 1938 as amended by Tamil Nadu Act XXIV of 1950, the mortgage debt shall be deemed to have been wholly discharged in view of the fact that the mortgagees had been in possession of the property for an aggregate period of thirty years commencing from 1899. Consequently, when Act XXIV of 1950 came into force, the mortgage debt shall be deemed to have been completely discharged. If so, the question for consideration is what is the Article of the Limitation Act that is applicable to the present suit for redemption and recovery of possession of the mortgaged property on the ground that the mortgage debt stood discharged. Article 148 of the First Schedule to the Indian Limitation Act, 1908 reads as follows : (Omitted) [Article 61(a) of the schedule to

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

the Limitation Act, 1963 also referred]. Thus it will be seen that under both the Articles, the first column refers to a suit to redeem or to recover possession of the immovable property mortgaged. Similarly, the third column mentions the starting point of limitation as the accrual of the right to redeem or to recover possession of the mortgaged property. In the present case, on the admitted position when on 18th October, 1950 when Tamil Nadu Act XXIV of 1950 came into force, the mortgage debt stood completely discharged, the right of the first respondent to formally sue for redemption and to recover possession of the immovable property mortgagee accrued. Under the Indian Limitation Act of 1908, from that date the first respondent had a period of sixty years and under the Limitation Act of 1963, the first respondent had a period of thirty years. The suit in the present case was instituted in 1968. Consequently the suit is within the period of limitation, whether the limitation is calculated with reference to Article 148 of the First Schedule to the Indian Limitation Act of 1908 or under Article 61(a) of the Schedule to the Limitation Act of 1963 or under Article 61(a) of the Schedule to the Limitation Act of 1963. It cannot be disputed that the moment the mortgage debt is paid or deemed to have been paid statutorily, the mortgagee will have no right to retain possession of the property and the mortgagor will have the right to recover possession of the property. Therefore, it is that the first respondent obtained the right to recover possession of the property on 18th October, 1950. The only question is what was the period of limitation for a suit to be filed by her for recovery of possession of the property. As we pointed out already, that period was sixty years under the Indian Limitation Act of 1908 and is thirty years under the Limitation Act of 1963. The suit having been filed in 1968, that is within 18 years from the date of the accrual of the cause of action, is within time on the basis of either of the above two provisions of the Limitation Act. Hence we are of the opinion that the conclusion of the learned Judge is correct and therefore the Letters Patent Appeal fails and is dismissed."

This decision squarely applies to the present case.

14. Clause 8(5)(a) of the Tamil Nadu Debt Relief Act 38 of 1972 reads as follows :

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

"8. Special provision in respect of mortgages. -
.....
(5)(a) Where the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of thirty years or more, then, notwithstanding anything contained in sections 7, 11 and 12, the mortgage debt shall be deemed to have been wholly discharged with effect from the expiry of the period of thirty years or where such period expired before the publication of this Act, with effect from the date of such publication -
....."

In this case, the mortgagee has been in possession of the whole of the property for an aggregate period of thirty years and more and therefore, the mortgage debt is deemed to have been wholly discharged on the expiry of the said period of thirty years. In (1994) 2 Supp. S.C.C. 524 [VAIDESWARA IYER VS. KAMAKSHI AMMAL] also, the Supreme Court held that where a mortgage debt got wiped out on a specified date by operation of law, the limitation for filing suit for possession of mortgaged property was 30 years and not 12 years, and Article 61 (a) and not 65 was applicable. It was held by the Supreme Court as follows :

"It will be noted that Article 61(a) refers not only to the suit to redeem but also the suit to recover possession of immovable property mortgaged. On January 10, 1953, by operation of the aforementioned Tamil Nadu Acts, the mortgage ceased to exist and upon that date, the mortgagor acquired the right to recover possession of the immovable property mortgaged. In our view, the suit is squarely covered by Article 61(a). Looked at the other way, Article 65 has no application because in a case such as this, it cannot be said that on January 10, 1953, the possession of the defendant became adverse to that of the plaintiffs so that the suit to recover possession had to be filed within 12 years from that date."

WEB COPY

So, this decision also is in favour of the plaintiffs.

15. To conclude, we hold that though the mortgage deed gave the mortgagor the right to repay before the four year period, the mortgage money 'became due' only in 1945. This is in accordance with the view of the Privy Council.

https://hcservices.ecourts.gov.in/hcservices/

16. Next, as per the proviso to Section 30(a) of the Limitation Act, 1963, the suit for redemption could be filed within thirty years from 1945. So, when the Act 38 of 1972 came into force, the mortgage was still in existence. It got wiped off by the coming of the Act. So, this was the date when the cause of action accrued for the mortgagor to sue for possession. Therefore, the respondent had 30 years' time from the date when the debt got discharged. The suit filed in 1979 is, therefore, in time.

17. The conclusion of the lower Appellate Court is confirmed and the civil miscellaneous appeal is dismissed. No costs.

ab

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Subordinate Judge,
   Namakkal

2. The Principal District Munsif,
   Namakkal.

+ 1 cc to Mr.K.Yamunan, Advocate SR No.37707

GG(CO)
SR/15.9.2005

Judgment in
C.M.A. No.602 of 1998.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/